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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1994

PACIFIC NORTHWEST VENISON PRODUCERS, a Washington corporation, et al., Petitioners,

v.

CURT SMITCH, Director of Washington Department of Wildlife, et al., Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

BRIEF IN OPPOSITION TO PACIFIC NORTHWEST VENISON'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Contemporary Commerce Clause analysis subjects state regulations to alternative tests depending upon whether the regulations affirmatively discriminate against out-of-state commerce to achieve some economic advantage or whether the regulations apply evenhandedly, with an incidental burden on out-of-state commerce. The regulations at issue here made it unlawful, with certain exceptions, to "import into the state, hold, possess, propagate, offer for sale, sell, transfer, or release" certain animals. The questions presented by the Ninth Circuit's resolution of the Commerce Clause challenge to these regulations are as follows:

1. Whether Washington's regulations are per se discriminatory simply because they include the word "import" or whether the entire regulation should be considered to determine its discriminatory nature or lack thereof.

2. Whether the court below employed the correct tests for analyzing Washington's regulations under the Commerce Clause and the correct standards for resolving the issues raised on cross motions for summary judgment.

LIST OF PARTIES

The Washington State Department of Wildlife (hereinafter referred to as "Department") was dismissed from this lawsuit based on Eleventh Amendment immunity. (9/2/92 Memorandum Decision of the United States District Court, Western District of Washington, Honorable William L. Dwyer.) The dismissal of the Department was not appealed. Consequently, the Department is not party to this case as petitioners had alleged. All other parties are as listed in the caption of the petition.

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I. STATEMENT OF THE CASE

A. *Nature Of The Case.*

Petitioners, et al. (hereinafter Petitioners or PNVP) filed a lawsuit challenging the constitutionality of temporary regulations adopted by the Department and the Wildlife Commission on June 19, 1992. PNVP sought declaratory relief,

injunctive relief, and damages arguing that the temporary regulations violated the Equal Protection, Due Process, and Commerce Clauses, that the regulations constituted a regulatory taking of property without just compensation, and that the regulations were preempted by the Endangered Species Act, 16 U.S.C. { 1531, et seq., and the Animal Welfare Act, 7 U.S.C. { 2131, et seq.

B. *Course Of Proceedings And Disposition Below.*

On August 10, 1992, the district court heard oral argument on cross motions for summary judgment on all constitutional issues. SER 20. On September 2, 1992, the district court issued a memorandum decision, injunction, and order dismissing the bulk of PNVP's claims, including the Commerce Clause claim.

Petitioners appealed only the Commerce Clause issue which the Ninth Circuit resolved in respondents favor; *Pacific Northwest Venison Producers, et al. v. Curt Smitch, et al.* 20 F.3d 3042 (9th Cir. 1994) (Appendix 1, et seq. to Petition for Writ of Certiorari).

C. *Statement of Facts.*

1. *Description of Regulatory Backdrop and of the Temporary Rules Regulating "Game Farming" and "Game Ranching."*

On June 19, 1992, the Washington State Wildlife Commission and the Director of the Department acted on an emergency basis to amend three existing administrative regulations pertaining to the importation and retention of certain "wildlife" species and "deleterious exotic wildlife."[1]

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[1]Wildlife is defined in RCW 77.08.010(16) as:

> all species of the animal kingdom whose members exist in Washington in a wild state.

As of June 19, 1992, the State of Washington had no regulations in effect to protect resident wildlife against the risks posed by certain species held on game farms and/or game ranches. Contrary to PNVP's assertions, the Washington State Department of Agriculture had no regulations or authority to require testing, quarantine or destruction of captive wildlife or exotic cervids.

On June 19, the Department amended WAC 232-12-017 (deleterious exotic wildlife), WAC 232-12-064 (live wildlife) and WAC 232-12-021 (importation and retention of dead nonresident wildlife). The petitioners did not challenge WAC 232-12-021 (importation and retention of dead nonresident wildlife), and it will not be discussed further.

WAC 232-12-017 was promulgated by the Department pursuant to express statutory authority that empowers and directs the Commission to designate as deleterious exotic wildlife, those species of the animal kingdom, not native to Washington, which are dangerous to the environment or wildlife of the state. RCW 77.12.020(7).

Prior to the subject amendments, WAC 232-12-017 designated 20 individual animals, 10 genera and one family of

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> This includes but is not limited to mammals, birds, reptiles, amphibians, fish and invertebrates. The term "wildlife" does not include feral domestic mammals, the family Muridae of the order Rodentia (old world rats and mice), or those fish, shellfish, and marine invertebrates classified by the director of fisheries. The term "wildlife": includes all stages of development and the bodily parts of wildlife members.

Deleterious exotic wildlife is defined in RCW 77.08.010(25) as: "species of the animal kingdom, not native to Washington and designated as dangerous to the environment or wildlife of the state."

animals, and made it unlawful to: "import into the state, hold, possess, propagate, sell, transfer or release live specimens" of these animals, WAC 232-12-017(5) (pre-June 19, 1992).

The subject amendments to WAC 232-12-017 designated as deleterious, nine additional species in the family Bovidae and four species (sub-species) in the family Cervidae (exotic deer). For the reasons identified in the affidavits of Dr. Briggs Hall, Dr. Tom Thorne, Dr. Margaret Pybus, Dr. Peter Dratch, Mike Davison, Gary Burke, Huey Dawson, Max Zahn, Woodrow Myers, Dr. Michael Miller and N. Thompson Hobbs, each newly designated species presents serious risks to the environment and wildlife of the state. The nature of the risks posed by these species is discussed in more detail below.

WAC 232-12-064 is promulgated pursuant to express authority in the Director of the Department to regulate the collection, importation, and transportation of wildlife. RCW 77.12.030. WAC 232-12-064 was amended on June 19 to prohibit importation, possession, propagation, or transfer of four species in the family of Cervidae (deer, elk and moose), and to reinforce that the sale or other commercialization of those species is illegal.

It has never been legal to "[sell] or otherwise commercialize on" such wildlife. WAC 232-12-064(5) (pre-June 1992). In the absence of authorizing rules, the importation, sale, possession, etc., of wildlife is unlawful pursuant to state law; RCW 77.16.040, which provides in pertinent part:

> Except as authorized by law or rule, it is unlawful to bring into this state, offer for sale, sell, possess, exchange, buy, transport, or ship wildlife or articles made from an endangered species. . . .

Under this law and department rules, as they existed both before and after the subject amendments, it is illegal to offer for sale, sell, purchase or trade the venison, or other edible parts, or velvet antlers of deer or elk species which exist in a wild state in Washington. To the extent petitioners were engaged in the commercialization of native deer or elk species, they were in

violation of state law prior to the subject amendments. PNVP never challenged this state law.

The subject amendments to the regulations were adopted on an emergency basis so as to protect Washington's wildlife resource against the risks posed by game farming and game ranching of the subject species while the Department worked with interested parties to develop permanent regulations addressing the subject.

2. ***Risks to Native Wildlife Addressed by Regulation of "Game Farming" and "Game Ranching."***

At the risk of oversimplifying the issues, the emergency regulations were aimed at addressing five categories of risk to resident wildlife. These risks may be summarized as follows:

1. Introduction/spread of diseases such as tuberculosis, brucellosis, malignant catarrhal fever, etc.
2. Introduction of parasites such as meningeal worm.
3. Hybridization between exotic species/hybrids and resident wildlife.
4. Habitat competition and displacement of resident wildlife.
5. Enforcement related risks such as theft of wildlife and/or poaching.

Although the quantum of risk may vary, the species added to WAC 232-12-017 and those specifically regulated pursuant to WAC 232-12-064(2), were added in June 1992 because they pose one or more of these five risks to resident wildlife.

In addition to the five risk factors mentioned above, there is an additional element concerning the potential for escape of captive animals and the ingress and egress of resident wildlife into areas holding the regulated animals.

The district court was provided with substantial evidence from both sides concerning the risks associated with the captive raising of exotic animals and wildlife. There was some disagreement among experts as to the quantum of risk to native wildlife posed in each of these areas by the various species with which the rules are concerned. There was also disagreement as to what quantum of risk to native wildlife should be tolerated by society in return for the benefits some believe game farming affords.

There was, however, no disagreement that as to each of these areas of risk, there is some real and substantial risk associated with game farming the animals addressed by these regulations. The undisputed and/or undisputable evidence concerning these risks was the basis upon which the district court could and did render summary judgment, and upon which the Ninth Circuit determined the Commerce Clause issue.
The undisputable facts regarding escape and the five risk categories will be discussed in turn.

a. *Escape*

There was no dispute that game farmed and/or ranched animals escape their enclosures. Despite stringent fencing requirements, there have been numerous documented escapes from game farms and game ranches within Colorado, Montana, Oregon and Washington. SER 280-81, SER 219-31, SER 171-74, SER 184-85. Escapes have resulted from (1) snow drifting over the fences and crusting hard enough for an animal to walk on; (2) flooding from spring snow melting, thunderstorms or rainstorms which often wash out fence creek crossings, allowing animals to move from pasture to pasture or completely escape; (3) the loosening of large boulders by freezing and thawing which have rolled down a hillside and torn a hole in the fences; (4) bull elk fighting with free-ranging elk on the outside and tearing up a section of fence; (5) predators such as coyotes digging under fences and leaving holes large enough for deer and antelope fawns and bighorn sheep lambs to escape; (6) elk, bighorn sheep and white-tailed deer jumping over the fence; (7) large trees falling on the fence and opening up an

escape route; and (8) vehicles wrecking and tearing up fences along the state highway allowing animals to escape. SER 120-21.

b. *Disease.*

It was undisputed that game farm animals are capable of transmitting numerous diseases such as tuberculosis, brucellosis, malignant catarrhal fever, and others. ER 55, ER 182-83, ER 212. TB organisms can be passed directly from an infected individual to an individual in close proximity and both captive and free ranging cervids and other prohibited species can be infected with and transmit bovine tuberculosis and brucellosis. ER 211, ER 55, ER 182-83.

A number of states have or had captive cervid herds with TB which can be passed to wild animals. Colorado suffered a TB outbreak in a captive elk herd. The prevalence of TB in that herd was 69% in animals over two years old. ER 450.

TB tests for cervids are unproven, unreliable and/or unavailable. At the very best, they are only 80 to 85% effective. ER 236, ER 148-150. In other words, if there were 100 infected deer, the cervical test for the deer would miss 15 to 20 of those infected deer. SER 316-17.

Moreover, the consequences of a TB outbreak in cattle is substantially different than the consequences of a TB outbreak in captive cervids. Cows or other domestic livestock will not join-up with wild herds of deer or elk. Once TB infects wild herds, it will be virtually impossible to control. ER 213, 215.

c. *Parasites.*

The meningeal worm (brain worm) is a parasite which invades the brain and central nervous system of infected animals, and is illustrative of the risks associated with parasite introduction. SER 72-73. The primary host for this parasite is the white-tail deer. For some reason, the parasite stays on the surface of the brain and/or spinal cord of the white-tail deer and consequently causes essentially no damage to the white-tail deer. SER 72. The white-tail deer, as host, however, allows the

parasite to generate larvae which are capable of being transmitted to virtually any herbivore or ungulate via an intermediate host (slugs or snails). SER 72.

When the parasite is transmitted to other animals, such as caribou, moose, elk, mule deer or black-tail deer, the parasite no longer sits on the surface of the brain or the spinal cord. The parasite burrows into the brain or spinal cord causing significant neurological damage and eventual death. SER 72-73.

To date, the meningeal worm has not been documented in the Northwest. It is, however, prevalent in white-tail deer on the eastern side of the Great Plains where white-tail deer are essentially the only viable cervid species. ER 305. It is not known why this parasite has been geographically limited to the eastern side of the Great Plains region. SER 74. It is suspected that as you approach the more arid plains region, the prevalence of the intermediate hosts (re: slugs, and snails) decreases. SER 74.

There are substantial risks of circumventing the unknown limiting factors for meningeal worm if animals are artificially moved from east to west. SER 74. Dr. Pybus concluded that there is little reason to doubt that the parasite, once transported to northwestern North America, could very easily thrive in this region. SER 74. The consequences of infecting wild animals in North America with this parasite would be devastating.

d. *Hybridization.*

The Court was presented with substantial evidence that many captive exotic cervids and/or their intentionally crossbred offspring are capable of hybridizing with native wildlife and thus destroying the genetic integrity of Washington's native wildlife.

Washington is one of only a handful of states to have all four (4) genera of the cervidae family of North American elk. The consequences of altering the genetics of Washington's resident wildlife are irreversible. SER 131-69.

e. *Habitat Competition/Displacement.*

Again, here, as with disease and hybridization, the Court was presented with substantial evidence regarding the potential for habitat competition and dislocation of resident wildlife by exotic species. History is replete with examples of both intentional and inadvertent introductions of exotic plant and animal species with unanticipated and undesirable results. In the case of many exotic animal species, the potential for habitat competition/degradation is accentuated by attributes such as a high reproductive potential (large litter size or early breeding age), aggressive social behavior, flexible dietary requirements, absence of effective predators, and resistance to disease. The testimony of Dr. Zahn explained that feral populations of game farm animals have caused significant damage to wildlife habitat in a number of other states. SER 224-26.

In summary, the district and Ninth Circuit courts had substantial evidence upon which to assess the character of the subject regulations and upon which to gauge the availability of less burdensome alternatives.

II. REASONS FOR DENYING THE PETITION

The district court and court of appeals fully reviewed the record and cross motions for summary judgment, found no genuine issues of material fact, and held that Washington's regulations did not violate the Commerce Clause of the United States Constitution. There are no valid reasons for Certiorari of this case.

This case involves no conflict or confusion regarding the test to be applied in analyzing the validity of the subject regulations. Application of the usual test to the facts here involved is not worthy of Certiorari. Certiorari would merely require this Court to determine, for the third time, whether there were genuine issues of material fact preventing summary judgment.

This case does not present the issues framed by PNVP. Although these issues, as stated, may be intriguing, they lack any foundation in the record. Moreover, the text of the petition seems simply to request that the Supreme Court reevaluate the evidence presented on summary judgment.

There are only two issues presented by this case. The first is whether the court below was correct in determining that the regulations were not discriminatory. The second is whether the court's assessment of the evidence was correct in determining that the petitioners failed in their burden of proving the availability of less burdensome alternatives that would achieve the state's interests as well as the challenged regulations.

The court below employed the correct tests and properly evaluated the evidence in the context of cross motions for summary judgment.

A. The Opinion Below Correctly Employs The Tests For Determining If State Regulations Discriminate Against Out-Of-State Commerce And If The Burden Imposed By Such Regulations Is Clearly Excessive.

The opinion below accurately applies this Court's well established rules for analyzing state regulations under the Commerce Clause. The opinion begins by correctly explaining the difference in analysis between state laws that discriminate by treating commerce differently based on origin of out-of-state and state laws that deal with commerce evenhandedly, but incidentally burden commerce.

> [S]tate regulations may violate the Commerce Clause either because the regulations discriminate against interstate or foreign commerce, or because they incidentally affect such commerce. If the regulations discriminate in favor in-state interests, the state has the burden of establishing that a legitimate state interest unrelated to economic protectionism is served by the regulations that could not be served as well by less discriminatory alternatives. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986). In contrast, if the regulations apply even-handedly to in-state and out-of-state interests [but incidentally burden commerce], the party challenging the regulations must establish that the incidental burdens on interstate and foreign commerce are clearly excessive in relation to the punitive local

> benefits. *See Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 525-26 (1989); *Minnesota v. Cloverleaf Creamery Co.*, 449 U.S. 456, 471 (1981).

20 F.3d at 1012 (Appendix 8-9 to Petition for Writ of Certiorari). The Ninth Circuit stated the test correctly. If the regulations discriminate between in-state and out-of-state commerce, then the burden is on the state to show that the state's interest could not be served as well by less discriminatory alternatives. In contrast, if the regulations do not discriminate but yet incidentally burden commerce, those challenging the regulations must show that the incidental burdens are clearly excessive in relation to the state's interest.

The Petitioners argue that the opinion simply ignored the applicable standards for review of regulations that "overtly discriminate against interstate commerce." Petition at 10. The lower court expressly held, however, that the regulations are evenhanded and do not discriminate against interstate commerce. 20 F.3d at 1013 (Appendix 11 to Petition for Writ of Certiorari.) ("we apply the test for even-handed regulations with incidental burdens on interstate and foreign commerce.")

PNVP failed in its burden of showing that the regulations were discriminatory. *Hughes v. Oklahoma*, 411 U.S. 322, 336 (1970). The Ninth Circuit analyzed but rejected both of PNVP's two theories that the regulations were discriminatory ("the ban on importation" and "the grandfather clause"). PNVP's reliance on the word "import" was soundly rejected by the lower court:

> In practical effect, the importation ban adds nothing to the prohibitions that apply equally to in-state and out-of-state interests, because animals could not be imported if they are not allowed to be held, possessed, transferred, or sold once inside the state. An import ban that simply effectuates a complete ban on commerce in certain items is not discriminatory, as long as the ban on commerce does not make distinctions based on the origin of the items. See Chemical

> Waste Management, Inc. v. Hunt, 112 S. Ct. 2009, 2016-17 (1992) (discussing quarantine laws).

20 F.3d at 1012. In other words, with or without the word "import" in the list of actions prohibited, the effect on commerce is the same and is evenhanded. Regardless of origin in-state or out-of-state, commerce in a regulated species is not allowed in Washington.

It is in this context that PNVP alleges there is a conflict between the Ninth and Tenth Circuits.

The alleged conflict among circuits concerns the opinion of the Tenth Circuit in *Dorrance v. McCarthy*, 957 F.2d 761 (10th Cir. 1992). In large part, however, the Tenth Circuit is in accord with the opinion below. Like the Ninth Circuit, the Tenth Circuit determined that Wyo. Stat. § 23-1-103, barring all private ownership of big game animals, treated commerce evenhandedly. 957 F.2d at 763. The Tenth Circuit found, however, that Wyo. Stat. § 23-3-301, barring importation into Wyoming of any living big game animal, constituted discriminatory treatment of interstate commerce. 957 F.2d at 765.

The Ninth Circuit disagreed that the word "import," in the context of the subject regulations, rendered them per se discriminatory regardless of the overall regulatory scheme. 20 F.3d at 1012 (Appendix 10 to Petition for Writ of Certiorari). The Ninth Circuit held that the word "import" added nothing to the prohibitions that applied equally to the in-state interests. The Ninth Circuit found that "an import ban that simply effectuates a complete ban on commerce in certain items is not discriminatory, as long as the ban on commerce does not make distinctions based on the origin of the items (citation omitted)." 20 F.3d at 1012 (Appendix 10 to Petition for Writ of Certiorari).

The alleged "conflict between circuits," is in reality two different courts labelling two different state enactments as discriminatory or even-handed based on their respective interpretations of the language. Whether a particular state regulation discriminates against out-of-state commerce will be unique to the regulation in question.

There is no conflict regarding the circuit courts' substantive analysis of discriminatory or evenhanded state laws affecting commerce. Certiorari is not warranted to address the unique, language-specific issues of whether Washington or Wyoming laws are discriminatory or evenhanded.

PNVP also argues that Washington's regulations cut off all commerce at the border and are therefore discriminatory. Petition at 19, citing *Maine v. Taylor* and *Hughes v. Oklahoma*. Under Washington law, however, a person cannot purchase and possess an elk or sika deer regardless of whether the animal is acquired within or outside the state. There is no different treatment based on origin of items of commerce. The laws at issue in *Maine* and *Hughes* are not analogous to the Washington regulations.

PNVP's argument that the court below erred by not employing the standard of review for *discriminatory* state laws has no merit since the regulations do not discriminate. Even if the Washington regulations did discriminate against out-of-state commerce, however, Certiorari would still be unwarranted. Eight years ago this Court decided *Maine v. Taylor,* and explained how to analyze state laws that discriminate against out-of-state commerce to protect native wildlife. Nothing in the opinion below contradicts or diverges from the Court's analysis in *Maine v. Taylor*. Lower courts have shown no difficulties with the *Maine v. Taylor* analysis. Nothing would be served by repeating that analysis.

B. The Court of Appeals Applied The Proper Standard of Review For Evenhanded State Regulations That Have Incidental Effects On Interstate Commerce.

After rejecting PNVP's arguments that the regulations are discriminatory, the only remaining Commerce Clause issue is whether the lower court correctly applied the test for analyzing evenhanded regulations and whether it applied the correct standards for summary judgment. Neither of these issues merit Certiorari.

The court below properly followed this Court's analysis for balancing putative local benefits against the burdens on

commerce. Quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), the court stated:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . Once a legitimate local purpose is found, the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

20 F.3d at 1014. The opinion below correctly applied the *Pike* analysis on summary judgment, as shown by a review of the elements of that balancing test.

1. ***There Are No Genuine Issues of Material Fact Regarding the Putative Local Benefits of the Regulations.***

The Petitioners assert that the state's regulations are based merely on a "concern for its native wildlife." There was no genuine issue of material fact whether the regulations served important state interests, such as protecting native wildlife from diseases and parasites carried by the regulated species, maintaining genetic purity of native wildlife, avoiding habitat competition from exotic escaped animals, preventing poaching of native wildlife for additions to captive herds. 20 F.3d at 622. Prior cases of this Court demonstrate that these are substantial and important local interests. *See Maine v. Taylor*, *supra*; *Hughes v. Oklahoma*, 441 U.S. 332, 337 (1979).

Given that there was no genuine issue of fact regarding the putative local interests served by Washington's regulations,

PNVP had to show that the incidental burden on interstate commerce was "clearly excessive" when compared to local interest served by the regulations. PNVP could have done so by proving that there were less burdensome alternatives that served Washington's interest in protecting native wildlife "as well" as the challenged regulations. PNVP failed to produce evidence to create a genuine issue of fact regarding the availability of less burdensome alternatives that would serve the state's interests as well.

2. *There Are No Genuine Issues of Material Fact Regarding the Absence of Less Burdensome Alternatives.*

The Petition fails to offer any coherent argument on alternatives to the regulations. First, the Petition incorrectly states that Washington had the burden to show that the alternatives were "infeasible." Petition at 23. *Pike* and subsequent cases demonstrate that for even-handed state regulations, the challenger faces a heavy burden of proving unconstitutionality.

PNVP also mischaracterizes the issue regarding the existence of less burdensome alternatives. A "less burdensome alternative" tends to show that state regulation is "clearly excessive" only if that alternative serves the putative local interests *as well* as the challenged regulations. E.g. *Pike*, 397 U.S. at 142 ("whether it could be promoted *'as well'* with a lesser impact on interstate activities.") In this case, PNVP's own evidence substantiated the risks which these regulations address. Moreover, PNVP, offered evidence about alternatives that, according to PNVP's own evidence, would *not* protect Washington wildlife as well as the adopted regulations. In each of the categories of risk, the undisputed and/or undisputable evidence supports the validity of the subject regulations.

a. *Escape.*

Petitioner Anita Rich admitted, that despite a seven foot tall, high tensile steel fence, with knots at every joint, fence

anchors, barbed wire and shade cloth, a sika deer escaped the enclosure by some unknown means. ER 364. Dr. Davis, petitioners' expert, acknowledged that game farmed animals "will get out, just like cattle." ER 216. Even Dr. Templeton, another of petitioners' experts, admitted the "possibility that some or all cervids could escape because of some natural disaster that destroyed the fences and neutralized the attempts at recapture." ER 432.

PNVP could not contradict other evidence of escape. In addition to the testimony of the petitioners' experts, Dr. Mike Miller, a veterinarian for Colorado Department of Wildlife, indicated that, despite stringent fencing requirements, there have been numerous documented escapes from game farms and game ranches within Colorado. SER 280-81. (Declaration of Miller, pp. 3-4.) Huey Dawson, the manager of the Sybille Wildlife Research Facility, also chronicled known escapes of hoofed big game species from the Sybille Wildlife Research Unit owned and administered by the Wyoming Game and Fish Department. SER 219-21. As discussed in the Statement of the Case, these escapes have resulted from any number of natural occurrences and the actions or inactions of man. SER 120-21.

b. ***Disease.***

With respect to disease, PNVP's own evidence regarding tuberculosis demonstrated the validity of the regulations.

There was no dispute that both captive and free ranging cervids and the other prohibited species can be infected with and transmit bovine tuberculosis and brucellosis. Dr. Mead confirmed that at least 12 captive cervid herds had TB and that wild animals can get and carry brucellosis. ER 55, 182-83. Dr. Davis from Texas confirmed that TB organisms can be passed directly from an infected individual to an individual in close proximity. ER 211.

The Declaration of Jim Williams, the Colorado State veterinarian, confirmed that Colorado suffered a major TB outbreak in a captive elk herd. ER 450. The prevalence of TB in that herd was 69% in animals over two years old. ER 450.

PNVP argued that TB tests on cervids were an alternative. PNVP's own experts, however, admitted that "the current TB tests (cervical for deer) are only 80 to 85% effective." ER 236 (Dr. Dix); ER 148-150 (Deposition of Dr. Mead). In other words, if there were 100 infected deer, the cervical test for the deer would miss 15 to 20 of those infected deer. SER 316-17 (Deposition of Dr. Mead). Dr. Mead also acknowledged that he is not one-hundred percent confident that if the best TB test for a cervid herd was negative then the animals are TB free. ER 158. Dr. Mead also admitted that one-third of bovine herds cleared by TB testing came back within five years as infected. SER 317. PNVP simply opines that even if TB testing is only 80% effective, it is acceptable. E.g. ER 162.

PNVP's evidence, therefore, does not contradict the very real potential for tuberculosis and brucellosis transmission to native wildlife from the regulated species. The consequences of a TB outbreak in cattle is substantially different than the consequences of a TB outbreak in captive cervids. Cows or other domestic livestock will not join-up with wild herds of deer or elk. Once TB infects wild herds, it will be virtually impossible to control. ER 213, 215.

The risk of TB and brucellosis in captive wildlife species is substantial. The risk of transmission to native wildlife is also substantial. The consequences of infecting native wildlife with TB or brucellosis would be catastrophic.

c. *Parasites.*

As with diseases, there are a multitude of parasites which may infect both captive and wild ranging cervids and other wildlife. Again, a discussion of the evidence concerning one such parasite is sufficient to validate the Department's regulations.

As was discussed in the Statement of the Facts, the meningeal worm (brain worm) is a parasite which invades the brain and central nervous system of infected animals. SER 72-73 (Dr. Pybus). The white-tail deer, as host for this parasite, suffers no damage. The white-tail deer, however,

allows the parasite to generate larvae which leave the white-tail deer on the fecal pellets. SER 72.

When the parasite is transmitted to other animals, such as caribou, moose, elk, mule deer or blacktail deer the parasite no longer sits on the surface of the brain or the spinal cord. The parasite burrows into the brain or spinal cord causing significant neurological damage and eventual death. SER 72-73.

PNVP relies on Dr. Foreyt who opines that white-tailed deer are the only "important" reservoir of the parasite meningeal worm. Dr. Foreyt had to acknowledge, however, that in an experiment (conducted by Dr. Pybus and other associates generally considered to be the foremost experts in this area) and "in a few naturally documented cases" infected elk have been shown to occasionally pass low numbers of larvae, and therefore should be considered as a potential host (of this parasite). ER 305-7.

As discussed in detail in the Declaration of Dr. Pybus, SER 70-79, the experiment which she and her colleagues conducted conclusively established that not only white-tailed deer but elk were capable of becoming infected with and transmitting the larvae of the meningeal worm. SER 77. She further found that elk shed this larvae intermittently at low densities making it very difficult to test for in fecal samples. SER 77.

Again, as with the discussion of tuberculosis, petitioners' own expert acknowledges that there is a risk, although he describes it as "very low," of meningeal worm becoming a disease problem in wildlife in Washington. ER 306. Dr. Foreyt opines that the "game ranching factor" can eliminate the risk posed by meningeal worm by prohibiting the movement of white-tailed deer and elk from indigenous areas of North America. Dr. Foreyt merely proposed the same course of action attempted in Alberta. After a relatively short period of time Alberta discovered that documents were being forged and animals, which in fact had been in northeastern North America, were being imported into Alberta under fraudulent documentation. SER 75. As a consequence, Alberta closed its borders.

d. ***Hybridization.***

PNVP had little evidence about risks of hybridization, PNVP relies on Dr. Joe Templeton to address risks of harmful hybridization. (Respondents' evidence on this subject was essentially unopposed. See Dr. Peter Dratch, SER 131-69; SER 201-8.) Within his area of competence, however, Dr. Templeton acknowledged that elk hybridization was possible from farmed elk or elk hybrids. PNVP's evidence from Dr. Dix also admitted the risks from captive elk. ER 250. None of PNVP's experts could dispute Dr. Dratch's testimony that 10% of captive elk were in fact hybrids.

There was no genuine issue of fact about the potential hybridization from prohibited species or the harm such crossbreeding will cause to native wildlife. See SER 131-69 (Dr. Dratch); SER 182 (Gary Burke).

e. ***Habitat Competition.***

Again, here, as with disease and hybridization, petitioners' own experts admit some potential for habitat competition and potential dislocation. The defendants' expert witnesses believe that this potential is far greater than that suggested by Dr. Dix. The evidence concerning habitat competition and displacement is summarized in the Statement of the Case, p. 14-15 *infra*. (See Declaration of Max Zahn, SER 224-26.) However, for purposes of summary judgment, the admissions of Dr. Dix alone are sufficient to validate the Department's concerns.

Dr. Dix (a game farmer and one of PNVP's experts) acknowledges that "it is conceivable that some of the deer on the proposed deleterious species list may compete with white-tails (sika having been so implicated), fallow deer clearly do not and no adequate data exists on the other species." ER 245. According to Dr. Dix, some studies (Hayes and Shotts 1959) suggest nutritional and/or disease resistance advantages of sika deer leading to a competitive advantage over white-tails.

For purposes of reviewing summary judgment, the petitioners and their experts admitted facts sufficient to validate the Department's regulations. The opinion below accurately held that there was no genuine issue regarding the propriety of the

state's interest and the absence of evidence of less burdensome alternatives that would serve the state's interests as well as the regulations. 20 F.3d at 1017. (Appendix 20-21 to Petition for Writ of Certiorari) PNVP offered only evidence about alternatives that it felt would be preferable. PNVP thus ignored the material issue – whether alternatives would work "as well." The lower court explained how PNVP's evidence missed the mark by admitting that PNVP's alternatives increased the risks to Washington's native wildlife, arguing only that the increased risks were acceptable to PNVP's affiant. 20 F.3d at 1016. (Appendix 19 to Petition for Writ of Certiorari)

PNVP now argues that any dispute among experts creates a genuine issue for trial. The summary judgment inquiry, however, focuses on "material" facts. Fed. R. Civ. P. 56(c). A material fact is one that will affect the outcome under the governing law. *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 248 (1986). PNVP's evidence provided no genuine issue that its preferred alternatives would work as well as the regulations and creates no genuine issue of material fact.

PNVP's assertions that the Ninth Circuit resolved disputes among experts against PNVP is also based on PNVP's misunderstanding of the material facts under the Commerce Clause. Since PNVP's experts merely argued that the state should accept greater risks to native wildlife, the evidence did not create a genuine issue regarding whether PNVP's alternatives worked as well. 20 F.3d at 1016 ("We doubt that these expert opinions as to the efficacy of PNVP's proposed alternatives could support a factual finding in PNVP's favor.") The third "Issue Presented" in the Petition, therefore, has no sound basis in the opinion or record.

The Ninth Circuit correctly noted that the power to weigh risks, advantages, and alternatives is vested with the legislative or quasi-legislative bodies adopting rules or statutes. 20 F. 3d 1016. The role of the courts is to determine whether the weighing of alternatives by legislating bodies results in "clearly excessive" burdens on interstate commerce. PNVP's arguments that a jury should be allowed the opportunity to weigh the advantages of alternatives is, therefore, without merit.

3. *There Are No Genuine Issue of Material Fact Regarding the Burdens on Interstate and Foreign Commerce.*

PNVP's Petition mischaracterizes the holding of the court of appeals regarding the incidental burdens on interstate commerce. In various places, PNVP asserts that the Ninth Circuit read the burden element out of the *Pike* balancing test, Petition at 18, that it contradicted *Clover Leaf Creamery Co.* by not analyzing the burden on interstate commerce, *ibid* at 21, or that it concluded that the burden on commerce was irrelevant, *ibid*. None of PNVP's arguments accurately reflect the lower court's opinion.

The Ninth Circuit expressly adopted the *Pike* test regarding incidental burdens. 20 F. 3d at 1014. The court then explained:

> To defeat the Department's motion for summary judgment, PNVP was required to show that it could offer evidence at trial legally sufficient to support a determination that the impacts of the regulations on interstate and foreign commerce are so great that they outweigh this vital state interest [in the preservation of its wildlife]. Evidence that interstate and foreign commerce is in some way affected by the regulations is not enough to meet his burden; what is required is evidence that these effects are of a type or an extent that could support a determination that they are "clearly excessive" in relation to the state's interest in the health of its native wildlife. [citations omitted]. PNVP has failed [sic] show that it could produce such evidence.

20 F.3d at 1014-15. This passage demonstrates how PNVP misstates the opinion below. The court of appeals did not ignore the burdens on interstate commerce or read that element out of the *Pike* balancing test. It expressly reviewed the record on summary judgment and found no evidence to justify further fact

finding about whether burdens on interstate commerce were "clearly excessive" in relation to the interest in protecting native wildlife from disease, parasites, hybridization, or competition.

III. CONCLUSION

Certiorari is not warranted to review the evidentiary record on summary judgment for a third time. The court of appeals properly evaluated the evidence in the context of cross motions for summary judgment. From that evaluation, the court correctly concluded that the regulations at issue were not discriminatory and that petitioners had failed to show that the incidental burden on commerce was clearly excessive when compared to the state's interests in protecting its wildlife from the risks inherent in game farming and game ranching.

Certiorari should be denied.

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